

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF THE NORTH SNAKE )	
AND MAGIC VALLEY GROUND WATER )	Docket Nos.: <b>CM-MP-2009-001</b>
IRRIGATION DISTRICTS' 2009 JOINT )	<b>CM-MP-2009-002</b>
MITIGATION PLAN TO COMPENSATE )	<b>CM-MP-2009-003</b>
BLUE LAKES TROUT FARM, INC. )	
(Water Right Nos. 36-02356a, 36-07210, )	<b>ORDER GRANTING MOTION TO</b>
and 36-07427) )	<b>LIMIT SCOPE OF HEARING;</b>
_____ )	<b>DENYING MOTION TO STRIKE</b>
)	<b>CLEAR SPRINGS' PROTEST; and</b>
)	<b>SCHEDULING ORDER</b>
)	

**I. Scope of the Proceedings**

On November 2, 2009, the Director of the Department of Water Resources (“Director” or “Department”) issued his *Order Authorizing Limited Discovery* in which he authorized Blue Lakes Trout Farm, Inc. (“Blue Lakes”) to engage in “limited discovery on the certain topics raised in its Limited Discovery Motion. The question of whether any of the information obtained in the depositions is relevant and admissible may be addressed by the parties in the hearing process on the Ground Water Users’ mitigation plan for Blue Lakes.” *Order Authorizing Limited Discovery* at 2.

On December 4, 2009, the North Snake Ground Water District and Magic Valley Ground Water District (collectively referred to herein as the “Ground Water Districts”) moved the Director to limit the scope of the hearing. “The adequacy of the mitigation and method [of mitigation] is the purpose of the mitigation plan hearing. In order to proceed, the hearing on the proposed mitigation plan[] . . . should not revisit . . . the other broader issues pending on appeal.” *Ground Water Districts’ Motion to Limit Scope of Hearing and Proposed Schedule* at 3 (“Motion to Limit Scope”). The issues that are on appeal that the Ground Water Districts sought to exclude from the hearing are “matters relating to the trimline, ESPA model uncertainty, spring percentages, the amount of mitigation owed, the amount of material injury and the like . . . .” *Id.* at 2.

On December 16, 2009, Blue Lakes submitted its *Brief in Opposition to Ground Water Districts’ Motion to Limit Scope of the Hearing and Proposed Schedule* (“Blue Lakes Response”). Responding to the Ground Water Districts’ statement that the issues identified in their Motion to Limit Scope are on appeal, Blue Lakes stated it “will not appeal the District Court’s decision on the trimline and spring percentage issues.” *Blue Lakes Response* at 6. Because the Director is under an obligation “to utilize the best available data and methods to

determine injury and mitigation obligations . . . [.]” Blue Lakes stated that this is the forum in which to address the issues that Ground Water Districts seek to exclude. *Id.* at 8. Additionally, Blue Lakes argued that the Director must address the question of injury to its 1971 water right, 36-7210, in the mitigation proceeding. “Junior ground water users have the burden to show that they do not cause injury to Blue Lakes’ 1971 priority right. If juniors cannot meet this burden, to avoid curtailment, they must receive approval for a plan that will mitigate for the injury they cause to Blue Lakes’ 1971 and 1973 priority rights.” *Id.* at 9-10.

On December 16, 2009, Clear Springs Foods, Inc. (“Clear Springs”) filed its *Response to Ground Water Districts’ Motion to Limit Scope of Hearing and Proposed Schedule* (“Clear Springs Response”) stating its intention to join in the Blue Lakes Response. Clear Springs also stated it “does not intend to appeal the District Court’s decision on the trimline or spring percentage issues.” *Clear Springs Response* at 2.

On December 17, 2009, the City of Pocatello (“Pocatello”) filed its *Reply Brief in Support of Ground Water District’s Motion to Limit Scope of Hearing* (“Pocatello Reply”). Pocatello argued that “[t]he mitigation plans at issue in these captioned matters arise from determinations of injury made by the Director in a delivery call hearing. . . . To allow, as Clear Springs and others have suggested, that a hearing on the captioned mitigation plans provides them another ‘bite at the apple’ is impractical, uneconomical and also contrary to Idaho law.” *Pocatello Reply* at 2.

On December 18, 2009, the Ground Water Districts filed their *Reply in Support of Motion to Limit Scope of Hearing* (“Ground Water District Reply”). Citing *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 844, 70 P.3d 669, 682 (2003), the Ground Water Districts stated that *res judicata* should bar Blue Lakes from relitigating issues that were determined in its Conjunctive Management Rule 42 delivery call proceeding. Accordingly, the delivery call proceeding “afforded all parties the opportunity to contest the injury determinations made by the Director. In response the Ground Water Districts filed their 2009 Plan and all that remains is whether the 2009 Plan is approvable under Conjunctive Management Rule 43.” *Ground Water District Reply* at 4.

#### **A. Model Uncertainty and Spring Apportionment**

As found by former Director Dreher, recommended by the hearing officer, ordered by former Director Tuthill, and affirmed by the District Court, the Director’s decision to account for model uncertainty by assigning a value of 10% was proper. *See Order on Petition for Judicial Review* (June 19, 2009) and *Order on Petitions for Rehearing* (December 4, 2009). Additionally, the finding that 20% of the reach gains that accrue to the Devil’s Washbowl to Buhl Gage spring reach arrive at Blue Lakes’ facility was also found proper. *Id.* In using these values, the Director has determined that the amount of replacement water that must be provided by junior ground water users to the Devil’s Washbowl to Buhl Gage spring reach is 59.3 cfs, or 11.9 cfs directly to Blue Lakes (20% of 59.3 cfs). The purpose of the above-captioned mitigation plans is to satisfy this material injury determination either through reach gains, direct replacement water to Blue Lakes, or a combination thereof.

Blue Lakes and Clear Springs argue that the Director must now revisit these findings of fact because they are flawed. In support of its position, Blue Lakes states that the “Director has a duty to utilize the best available data and scientific methods to determine the impact of junior ground water diversions on senior water rights and administer water rights.” *Blue Lakes Response* at 6; *see also Clear Springs Response* at 3. Accordingly, “[i]n this proceeding, Blue Lakes intends to present evidence to show that there are more reliable and scientifically defensible methods to determine the impact of junior ground water diversions on Blue Lakes’ water supply, and to deal with model uncertainty in the administration of junior ground water rights.” *Id.*

Because the Director has an ongoing duty to administer the State’s water resources, the Director would ordinarily agree that, to the extent he is authorized to do so by Idaho law, he should utilize the best available information. There are at least two legal principles that prohibit the Director from considering the information proffered by Blue Lakes and Clear Springs.

First, when Judge Melanson issued his June 19, 2009 *Order on Petition for Judicial Review*, Blue Lakes, Clear Springs, and the Ground Water Districts took advantage of their procedural right to seek rehearing. Rehearing was granted by the District Court and an *Order on Petitions for Rehearing* was issued on December 4, 2009. According to Idaho Appellate Rule 13.3,<sup>1</sup> a court sitting in its appellate capacity may, upon “its own motion, or on motion of any party showing good cause, order a case to be remanded to the district court or to the administrative agency to take further action as designated in the order of remand.” I.A.R. 13.3(a). During remand, “the appeal shall remain pending in the Supreme Court, but the district court or administrative agency shall have jurisdiction to take all actions necessary to fulfill the requirements of the order of remand.” Notably, the court must state that remand is in accordance with I.A.R. 13.3 “before the issuance of an opinion . . . .” I.A.R. 13.3(a).

Here, neither opinion issued by Judge Melanson was in accordance with I.A.R. 13.3; accordingly, the Director is without jurisdiction to consider the arguments raised by Blue Lakes and Clear Springs. *See Syth v. Parke*, 121 Idaho 162, 163, 823 P.2d 766, 767 (1991). Judge Melanson’s December 4, 2009 *Order on Petitions for Rehearing* is an appealable order and jurisdiction will not be reinvested with the Director until either the time for appeal has expired with no party filing for appeal, or the matter is concluded by the Supreme Court. Even if Blue Lakes and Clear Springs elected not to appeal certain issues to the Supreme Court, the appellate rules do not state that jurisdiction would reinvest with the Director on discrete issues prior to a final opinion from the Supreme Court.

Setting aside the jurisdictional requirement, Blue Lakes and Clear Springs do not state whether the information they seek to present at hearing will overcome the principle of *res judicata*. Blue Lakes simply states that it “intends to present evidence to show that there are more reliable and scientifically defensible methods to determine the impact of junior ground water diversions on Blue Lakes’ water supply, and to deal with model uncertainty in the administration of junior ground water rights.” *Blue Lakes Response* at 6; *see also Clear Springs Response* at 3. In *Sagewillow*, the Supreme Court framed the doctrine of *res judicata* as follows:

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<sup>1</sup> “Any procedure for judicial review not specified or covered by these rules shall be in accordance with the appropriate rule of the Idaho Appellate Rules . . . .” I.R.C.P. 84(r).

The doctrine of res judicata applies to administrative proceedings. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991); *J & J Contractors/O.T. Davis Constr. v. State by Idaho Transp. Bd.*, 118 Idaho 535, 797 P.2d 1383 (1990). In *Joyce v. Murphy Land & Irrigation Company*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922), this Court stated that the scope of the doctrine of res judicata was as follows:

We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.

The ‘sameness’ of a cause of action for purposes of application of the doctrine of res judicata is determined by examining the operative facts underlying the two lawsuits. *Houser v. Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 649 P.2d 1197 (1982).

*Sagewillow* at 844, 70 P.3d at 682.

Here, Blue Lakes, Clear Springs, and the Ground Water Districts were party to the Conjunctive Management Rule 42 proceedings before the Director, the hearing officer, and the District Court. The District Court has affirmed the Director on the issues of model uncertainty and spring apportionment. Blue Lakes and Clear Springs have not stated that the information they intend to present is information that is different “as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.” *Id.*

#### **B. Injury to 36-7210**

Judge Melanson has remanded the question of injury to Blue Lakes’ 1971 water right, 36-7210, to apply the appropriate burdens of proof. As stated above, the Director does not have jurisdiction to consider this issue at the hearing on the mitigation plans. I.A.R. 13.3.

#### **II. Clear Springs’ Protest**

In response to the mitigation plan filed by the Ground Water Districts, Clear Springs filed a timely protest. On September 8, 2009, the Ground Water Districts filed a *Motion to Strike Clear Springs’ Protest to Joint Mitigation Plan for 2009* (“Motion to Strike”). The Ground Water Districts argued: (1) Clear Springs was not a party to the original delivery call filed by Blue Lakes; (2) Clear Springs does not meet the definition of “Protestant” under Rule 155 of the Department’s Rules of Procedure; (3) Clear Springs does not have standing to participate; and (4) Clear Springs should not be entitled to intervene under Rule 353 of the Department’s Rules of Procedure because it lacks the required requisite interest. *See Motion to Strike* at 2-4.

Since the filing of their *Motion to Strike*, Judge Melanson issued a decision in which he was asked by the Ground Water Districts “[w]hether the Director erred in allowing protests to be filed by entities other than Clear Springs [in response to the Ground Water Districts’ mitigation plan for Clear Springs]?” *Order on Petitions for Judicial Review*, Case Nos. 2009-00241 and 2009-00270 at 9 (December 4, 2009). In his opinion, Judge Melanson affirmed the Director’s decision not to strike protests filed by entities other than Clear Springs. *Order on Petitions for Judicial Review* at 19-22. The reasoning in that case is directly applicable in this case and does not need to be repeated. Therefore, the Ground Water Districts’ Motion to Strike is denied.

### **III. Hearing Schedule**

At the November 24, 2009 status conference, the Director asked counsel to prepare an agreeable hearing schedule. The Director was recently informed by counsel for the parties that a schedule could not be agreed upon. Based upon the proposals of the parties, the Director enters the following schedule:

January 11, 2010	Applicants file expert reports and lay testimony;
February 1, 2010	Protestants file expert reports, lay testimony, and rebuttal;
February 15, 2010	Applicants file reply testimony;
February 19, 2010	Deadline for dispositive motions;
March 5, 2010	Deadline for responses;
March 12, 2010	Deadline for replies; and
March 16, 2010	Hearing commences.

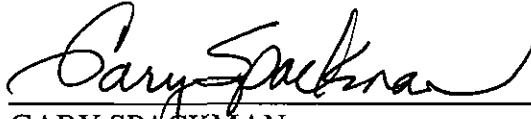
### **ORDER**

Based upon the foregoing, IT IS HEREBY ORDERED as follows:

The Ground Water Districts’ *Motion to Limit Scope* is GRANTED. The hearing on the three mitigation plans that have been filed with the Department shall be limited to the ability of the plans, either individually or collectively, to satisfy the mitigation requirement of 59.3 cfs to the Devil’s Washbowl to Buhl Gage spring reach or 11.9 cfs directly to Blue Lakes (20% of 59.3 cfs). Protestants to the mitigation plans are precluded from addressing, in these proceedings, those issues that are on appeal, particularly: model uncertainty, the trimline, spring apportionment, the amount of material injury found, the amount of mitigation owed, and injury to water right 36-7210.

IT IS FURTHER ORDERED that the Ground Water Districts' *Motion to Strike* is DENIED, and that the hearing schedule, as set forth above, is adopted.

Dated this 22<sup>nd</sup> day of December, 2009.

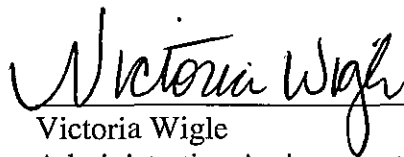
  
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GARY SPACKMAN  
Interim Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27<sup>th</sup> day of December 2009, the above and foregoing document was served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Randall C. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Candice M. McHugh RACINE OLSON 101 S Capitol Suite 208 Boise, ID 83702 <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Daniel V. Steenson Charles L. Honsinger S. Bryce Farris RINGERT LAW CHARTERED P.O. Box 2773 Boise, ID 83701-2773 <a href="mailto:dvs@ringertclark.com">dvs@ringertclark.com</a> <a href="mailto:clh@ringertclark.com">clh@ringertclark.com</a> <a href="mailto:sbf@ringertclark.com">sbf@ringertclark.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
John K. Simpson BARKER ROSHOLT & SIMPSON, LLP 1010 West Jefferson, Ste. 102 PO Box 2139 Boise, ID 83701-2139 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Sarah A. Klahn WHITE & JANKOWSKI 511 Sixteenth Street, Suite 500 Denver, CO 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

<p>Robert A. Maynard Erika E. Malmen PERKINS COIE, LLP 1111 West Jefferson Street, Suite 500 Boise, ID 83702-5391 <a href="mailto:rmaynard@perkinscoie.com">rmaynard@perkinscoie.com</a> <a href="mailto:emalmen@perkinscoie.com">emalmen@perkinscoie.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Travis L. Thompson Paul L. Arrington Sarah W. Higer BARKER ROSHOLT &amp; SIMPSON, LLP 113 Main Avenue West, Suite 303 PO Box 485 Twin Falls, ID 83303-0485 <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a> <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</a> <a href="mailto:swh@idahowaters.com">swh@idahowaters.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>William Parsons PARSONS SMITH &amp; STONE 137 West 13<sup>th</sup> Street Burley, ID 83318 <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>



Victoria Wigle  
Administrative Assistant to the Director  
Idaho Department of Water Resources